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In The

Supreme Court of the United States

October Term, 1996

INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey Corportion,

Petitioner,

vs.

BOARD OF TRUSTEES OF OPERATING ENGINEERS LOCAL 825 FUND SERVICE FACILITIES,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt provisions of the New Jersey Public Works Bond Act, N.J.S.A. 2A:44-143 *et seq.*, a generally applicable State law that functions without any reference to ERISA, which law requires contractors to post bonds for labor performed on and material supplied to public works projects, so as to preclude an ERISA fund from suing the surety on the bond.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Amici curiae hereby rely upon and incorporate by reference the List of Parties to the Proceedings Below set forth in the Petition for Writ of Certiorari by petitioner International Fidelity Insurance Company.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are various New Jersey non-profit multiemployer fringe benefit trust funds, established and governed under the provisions of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1002(c)(1). The funds provide benefits to covered employees of various labor organizations, and were established pursuant to separate trust indentures as required by law, 29 U.S.C. § 1001 *et seq.* Pursuant to the provisions of collective bargaining agreements between various unions and employers, each employer is required to pay contributions to each of the funds administered by the trustees of those funds as part of the compensation package paid to the employees represented by the various unions. These contributions enable the funds to provide pension, medical, hospital, annuity, unemployment and other benefits to covered employees.

The various funds provide such benefits to over 30,000 employees and approximately 70,000 additional dependents in the State of New Jersey. The funds provide these benefits to employees primarily in the construction and related industries.

For reasons not germane to the instant petition, there is a continuing problem of delinquent contractors in the construction industry. Numerous employers consistently fail or refuse to pay

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1. This brief is submitted on behalf of the New Jersey State Carpenter Benefit Funds, Carpenters Local No. 6 Benefit Funds, Laborers Local Union Nos. 472 & 172 Welfare and Pension Funds, Teamsters Local No. 408 Welfare and Pension Funds, and Laborers Local Union Nos. 72, 156, 569 & 711 Welfare and Pension Funds.

This brief was not authored in whole or in part by counsel for a party. No person or entity, other than *amici curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37 of the Rules of Court, petitioner and respondent have consented to the filing of this brief on behalf of *amici curiae*. Their letters of consent have been filed with the Clerk of the Court.

contributions due these funds. The failure to pay jeopardizes the medical, hospitalization, pension and other benefits due to the members, the beneficiaries of the trust, and undermines the financial integrity of the funds.

As with any type of properly operated pension and welfare fund, the various funds can remain financially sound only if they collect the contributions that were determined to be necessary to provide the benefits, and if they invest those contributions wisely. If the contributions are not made as promised by the contracting employers, then the funds have the highest fiduciary obligation to pursue payment from any and all legitimate sources so as to ensure that there are monies available when covered employees retire or take ill.

Petitioner seeks to bar the trustees of benefit funds in New Jersey from utilizing New Jersey's generally applicable bonding statute in order to pursue and collect monies owing as a result of work performed by covered employees on public projects. Such a result would preclude the trustees from discharging their obligations and needlessly deprive the participants and their beneficiaries of monies they worked for and that are rightfully theirs. *Amici curiae* thus have a keen interest in the petition *sub judice*.

OPINIONS BELOW

Petitioner seeks review of the decision of the Supreme Court of New Jersey reported at *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. International Fidelity Insurance Co.*, 148 N.J. 561, 691 A.2d 339 (1997), which is reprinted in petitioner's appendix at pp. A-1 through A-18. The decision of the Appellate Division of the Superior Court of New Jersey in this matter is reported at 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996), and is reprinted in petitioner's appendix at pp. A-19 through A-31.

STATEMENT OF JURISDICTION

Petitioner contends that this Court should grant *certiorari* pursuant to 28 U.S.C. § 1257(a) because the decision of the Supreme Court of New Jersey rendered on April 9, 1997 involves a question of whether a State statute is repugnant to the laws of the United States.

RELEVANT STATUTORY PROVISIONS INVOLVED

The statute relevant to this matter, N.J.S.A. 2A:44-143 *et seq.*, entitled the "New Jersey Public Works Bond Act" ("Bond Act"), is reprinted in petitioner's appendix at pp. A-32 through A-45.

STATEMENT OF THE CASE

Amici curiae hereby rely upon and incorporate by reference the Statement of the Case set forth in the Brief in Opposition to the Petition for Writ of Certiorari submitted by respondent Board of Trustees of Operating Engineers Local 825 Fund Service Facilities.

LEGAL ARGUMENT

THIS HONORABLE COURT SHOULD DENY *CERTIORARI* BECAUSE PETITIONER FAILS TO OFFER ANY COMPELLING REASONS FOR REVIEW OF THE DECISION OF THE SUPREME COURT OF NEW JERSEY; THE PREEMPTION ISSUE RAISED IN THIS PETITION HAS BEEN DETERMINED AND RESOLVED BY THIS COURT AND HAS BEEN UNIFORMLY FOLLOWED BY THE LOWER FEDERAL COURTS AND STATE COURTS.

Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Id.*

Petitioner urges this Court to grant *certiorari* because there purportedly exists conflicting authority on the issue presented for review; namely, whether ERISA preempts a union benefit fund's action against a surety under a state law of general applicability which does not refer to an ERISA plan. In particular, petitioner posits that there is a "split of authority" among the courts that have addressed the issue and, hence, there exists a compelling need to have this Court render a conclusive pronouncement.

Petitioner further contends that this Court should grant *certiorari* pursuant to 28 U.S.C. § 1257(a) because the decision rendered by the Supreme Court of New Jersey is repugnant to the laws of the United States. In particular, petitioner argues that the Supreme Court of New Jersey wrongly held that the Bond Act is not preempted by ERISA because its decision was based upon:

> (i) a misinterpretation of two recent decisions from this Court (*New York Conference Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. __, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997);
>
> (ii) the misapplication of two decisions that are readily distinguishable from the facts at issue here (*Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2nd Cir. 1995), and *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995));
>
> (iii) a decision to follow the reasoning of several wrongly-decided cases that upheld state statutes against an ERISA preemption challenge.

(Petition for Writ of Certiorari, at pp. 4-5).

For the reasons which follow, *certiorari* should be denied because there is no compelling reason for this Court to review the decision of the Supreme Court of New Jersey.

First, the decision of the Supreme Court of New Jersey represents a proper application of preemption analysis to the federal and state laws involved. The decision below correctly considered and construed the scope of the preemption provision in ERISA, the Congressional objectives in enacting ERISA, the language, purpose and history of the state law involved, and the judicial presumption against overly broad assertion of federal supremacy over longstanding state laws in traditional areas of state regulation. The analysis employed, and the result reached, by the Supreme Court of New Jersey, are entirely consistent with this Court's ERISA preemption rulings. Also, the New Jersey Supreme Court's interpretation of *Greenblatt* and *Ragan* is identical to the interpretation of those cases by the federal and state courts in those respective circuits.

Second, the alleged split among courts regarding this issue is more imagined than real. The petitioner fails, or simply refuses, to recognize that bond laws which refer to ERISA plans are different than those — such as the one involved here — which do not. To the extent court decisions find preempted a bond law which does *not* refer to an ERISA fund, those cases — of which there are only two — predate this Court's decision in *New York Conference Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 117 S. Ct. 832, 131 L. Ed. 2d 695 (1995). Any residue of confusion or conflict was resolved by this Court's decision in *Travelers*, a case relied upon by the Supreme Court of New Jersey. *Travelers* clarified this Court's prior ERISA preemption jurisprudence, and rendered a conclusive heuristic determination of the issue presented. The two cases cited by petitioner in support of its assertion that there is a split of authority on the preemption issue were decided before *Travelers* and cannot now be employed for the purpose of demonstrating a divergence of authority. There is no compelling reason for this Court to heed petitioner's call for yet another ERISA pronouncement; it already did so in *Travelers*.

In determining whether ERISA preempts a particular state law, this Court has delineated a two-part analysis, infused by the judicial presumption that Congress did not intend to supplant state laws. *Travelers*, 115 S. Ct. at 1676; *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L. Ed. 2d 576 (1981). The ERISA preemption analysis first requires a court to examine the text of the provision in question, 29 U.S.C. § 1144(a) ("Section 514(a)"), and if that is insufficient to resolve the matter, to look to the purpose of the Act in which the provision occurs. *Travelers*, 115 S. Ct. at 1677.

ERISA's preemption clause states, in pertinent part, that "ERISA preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (§ 514(a)). A state law "relates to" an ERISA plan for purposes of § 514(a) if it either (a) "refers to" or (b) has a "connection with" such a plan. *California Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. __, 117 S. Ct. 832, 837, 136 L. Ed. 2d. 791 (1997).

A state law or lawsuit "refers to" an ERISA plan not only if it expressly imposes requirements upon ERISA plans, but also if it is premised upon the existence of an ERISA plan, or if it acts immediately and exclusively upon such plans, or if the ERISA plan is essential to the law's operations. *Id.* 117 S. Ct. at 837-38. Thus, a state law refers to an ERISA plan if the state law is specifically designed to affect an ERISA plan, if it singles the plan out for special treatment, or if the rights or duties it creates are unique to such plans. *Mackey v. Lanier Collection Agency and Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988); *United Wire, Metal & Machine Health and Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3d Cir.), *cert. denied*, 510 U.S. 1031, 114 S. Ct. 651, 126 L. Ed. 2d 332 (1993); *Bricklayers Local 33 v. America's Marble Source*, 950 F.2d 114 (3d Cir. 1991).

A state law also "relates to" an ERISA plan for purposes of § 514(a) if it has a "connection with" such a plan. *Travelers*, 115 S.

Ct. at 1677. However, unlike laws or suits which refer to an ERISA plan as explained above, laws which have only a connection with an ERISA plan are more amorphously defined. Where the state law does not refer to a fund, plumbing the depths of "connection with" requires a critical analysis of the purpose of ERISA and the mediacy of that purpose with the state law. *Travelers*, 115 S. Ct. at 1677. An unchecked concept of "connection with" which is universal in nature is as unhelpful a measure of preemption as a notion of nearly infinite relations is to "relates to." *Id.* When the state law does not "refer to" a trust fund, courts must go beyond the unhelpful language of § 514(a) and look instead at the objectives of ERISA as a guide to what state laws Congress sought to supplant or to let stand.

ERISA is a comprehensive statute designed and intended to promote and preserve the interests of employees and their beneficiaries in employee welfare and pension funds. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1985). As this Court has repeatedly recognized and explained:

> In enacting ERISA, Congress' primary concern was with the management of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds. To that end, it established extensive reporting, disclosure, and fiduciary requirements to ensure against the possibility that the employee's expectations of the benefit would be defeated through poor management by the plan administrator.

Massachusetts v. Morash, 490 U.S. 107, 115, 109 S. Ct. 1660, 1673, 104 L. Ed. 2d 98 (1989). In this Court's most recent exercise in ERISA preemption, this same concern was again used as the guide in assessing, and denying, federal preemption. *Dillingham*, 117 S. Ct. at 832, 838-39.

Congress also intended ERISA to protect the plans themselves from being subjected to rules and regulations which would vary

from state to state, thereby burdening the plans with conflicting requirements which would hinder and render more expensive the operation of the plan. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 15 (1987); *United Wire, supra*; *Consumer Ben. Ass'n of U.S. v. Lexington Ins. Co.*, 731 F. Supp. 1510, 1515 (M.D. Ala. 1990). What triggers ERISA's preemption is not just *any* effect on a plan's administrative procedure, but a *particular* effect on the primary administrative function of the plan, such as mandating benefits, or determining eligibility for, or the amount of, a benefit. *Shaw*, 463 U.S. at 97; 103 S. Ct. at 2900; *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146-147 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989). Thus, state law has a connection with an ERISA plan if the law dictates the choices faced and made by the plan. *Dillingham*, 117 S. Ct. at 841; *Ferguson Electric Co., Inc. v. Foley*, 115 F.3d 237, 240 (3d Cir. 1997).

And, as noted above, the analysis of the scope of a federal law's preemptive power will be guided by the historic precept that the Court will never assume lightly that Congress has derogated state regulation, but instead the Court will start its analysis with the presumption that Congress did *not* intend to supplant state law. *Dillingham*, 117 S. Ct. at 838; *Travelers*, 115 S. Ct. at 2378.

It is within the context of the objective of ERISA to protect the plan participants' expected benefits by means of regulation of funding, fiduciary duty, and disclosure, combined with the Congressional intent of establishing a uniform body of benefits laws, that this Court has mapped out the course of federal pre-emption of state laws.

There can be no sensible contention that the New Jersey Bond Act "refers to" an ERISA plan. The Bond Act, N.J.S.A. 2A:44-143, was enacted in 1918 as a general statute permitting any supplier to a contractor of a public job to sue the surety on the bond. The Act does not contain a reference to any ERISA plan, and confers no special benefit to or unique status upon such plans. Indeed, petitioner makes no claim that it does. If preemption exists, it is not on the basis that the Bond Act refers to an ERISA plan.

Since the Bond Act does not refer to an ERISA plan, under any possible conception, the analysis must be whether the Act is connected with an ERISA plan.

Clearly the Bond Act imposes no financial or administrative burdens upon an ERISA plan. On the contrary, petitioner claims preemption precisely because the Bond Act supposedly *supplements* a fund's power to pursue monies owing to it. Nor does the Bond act mandate any benefits, eligibility requirements, or coverage. The Bond Act does not dictate any decisions or actions by the fund. The Bond Act does not affect a fund's administrative procedures, nor burden it with obligations or duties. It merely permits a fund to pursue a cause of action against a surety on a bond. Thus far, the Bond Act has not touched any of the indicia of a "connection with" an ERISA fund.

The courts have employed a further analysis to determine whether a state law or claim has a connection with an ERISA plan. That inquiry has focused on whether the law, or cause of action, requires the existence of an ERISA plan for its being. For example, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990), the Court found preempted a state-recognized wrongful discharge suit which would allow recovery when the plaintiff proves that the principal reason for his discharge was the employer's desire to avoid contributing to or paying benefits under its pension plan. *Id.* 498 U.S. at 140, 111 S. Ct. at 483. Explaining why the suit was preempted, this Court noted that in order to prevail, the plaintiff must plead, and the court must find, that an ERISA plan exists and that the employer intended to avoid its obligations under the plan. That is, "[b]ecause the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan." *Id.* 498 U.S. at 140, 111 S. Ct. at 483. There was no cause of action if there were no ERISA plan.

If the state law does not refer to an ERISA plan, and does not require an ERISA plan as a *sine qua non* for its being, the law is not preempted. For example, in *Dillingham*, the California law

required a public works contractor to pay its workers the local prevailing wage, but permitted a lower wage for participants in a state-approved apprenticeship program. The class of eligible apprenticeship programs was not confined to those covered by ERISA. The Court expressly remarked that the California rule functioned irrespective of the existence of an ERISA plan. *Dillingham*, 117 S. Ct. at 839. Moreover, the Court emphasized that the rate of wages to be paid on public jobs was quite remote from the "reporting, disclosure, fiduciary responsibility" issues with which ERISA is expressly concerned, and that wages on public jobs — as well as regulations of apprenticeship programs — were areas historically regulated by the states. *Id.* at 840. In language and meaning directly applicable to the instant case, the Court observed that California has required prevailing wages on public work projects for more than 40 years prior to the enactment of ERISA, which further corroborates its existence independent of ERISA. *Id.* Likewise, and as will be elaborated upon below, the New Jersey Bond Act at issue here was enacted in 1918, more than 50 years before ERISA.

This Court's preemption primer relating to state collection laws was in *Mackey*. In that case, the Court ruled that of Georgia's two anti-garnishment statutes, the one which expressly referred to and specifically prohibited the garnishment of ERISA plan benefits was preempted by ERISA because it applied *only* to ERISA plans, while the other Georgia garnishment law, which was of general application and did not refer to a fund, was *not* preempted. The former law was preempted because of its reference to a trust fund, making the analysis manifestly evident. But, as to the latter more general law, which simply provided for garnishment as a method of collection and did not refer to or mention ERISA plans, the Court found that it did not "relate to" ERISA benefit plans and therefore escaped ERISA's preemptive reach.

The Court noted that ERISA does not provide for a post-judgment collection mechanism, and that Fed. R. Civ. P. 69(a) defers to generalized state law to provide collection methods. *Mackey*,

486 U.S. at 833. Accordingly, the Court concluded that while any state law which "singles out" ERISA plans, whether by "express reference" or for "special treatment", would be preempted, a general state-law method for collecting judgments must remain undisturbed by ERISA. *Mackey*, 486 U.S. at 838 n. 12.

In short, a state law will be preempted if it expressly refers to an ERISA plan, if it was enacted to apply to ERISA plans, if it singles out such plans for special treatment, if it mandates or prohibits decisions by an ERISA plan, or if it acquired its existence by virtue of — or necessitates interpretation of — an ERISA plan. The state law at issue here does none of these. It is a law of general applicability which long antedates ERISA, does not refer to ERISA, does not impose duties on or bind ERISA plans, does not uniquely treat or benefit such plans, and does not require an ERISA plan for its existence.

The New Jersey Bond Act was enacted in 1918 as a law of general applicability for the benefit of all suppliers of equipment, machinery, material, fuels, and labor to public jobs. Specifically, and in pertinent part, N.J.S.A. 2A:44-143 provides:

> When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any county, municipality or school district thereof, the board, officer, or agent contracting on behalf of the State, county, municipality or school district, shall require the usual bond, as provided for by law, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for

> or about the construction, erection, alteration or repair of such buildings, works or improvements.

This provision is noteworthy both for what it does and does not contain. Enacted decades before ERISA was even a glimmer in Congress' eyes, the Bond Act delineates a risk-spreading form of insurance for *all* suppliers to a public job site. It is not limited to unions, or even labor, or even wages. It applies to providers of any machine, material, fuel or labor. It contains a means of protecting all who supply a public job.[2]

What the Bond Act does *not* contain, directly or indirectly, is any reference to a trust fund. The words or concept of fringe benefit fund, ERISA fund, employee trust fund or the like do not appear in the statute. The New Jersey Public Bond Act falls into that camp of state bond laws of general application which have no reference to a benefit fund, as opposed to those which expressly refer to such funds.

Since the reevaluation of ERISA preemption undertaken in *Travelers*, cases involving state laws requiring a surety bond have uniformly held that the state laws are not preempted. For instance, in *Trustees For Michigan Laborers' Health Care Fund v. Warranty Builders, Inc.*, 921 F. Supp. 471 (E.D. Mich. 1996), the funds sued

2. The petitioner asserts that to include the duty to pay fringe benefits in a surety bond would be unfair to the surety, which supposedly did not consider the risk of such liability. But the benefits owing to laborers on a public job are automatically included as a factor since such benefits are deemed a part of the prevailing wage. *See United States, ex rel. Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) (holding Miller Act provision insuring employer payment of "sums justly due" for labor performed, not limited to wages). Sureties in New Jersey were aware of the practice of including fringe benefits within definition of wages. *See Newark Laborers' Pension-Welfare Funds v. Commercial Union Ins. Co.*, 126 N.J. Super. 1, 312 A.2d 649 (App. Div. 1973) (noting surety had paid benefit contributions owed, and holding that costs and attorneys' fees were recoverable against surety in action to collect an employer's delinquent contributions).

the surety for contributions due by the contractor on a public works job. A Michigan law required the contractor on a public job to obtain a surety bond. The statute, similar in all respects to that in New Jersey, was one of general applicability. *Id.* at 477. The court found that the law was not preempted. As the court explained, the action to collect on the bond constitutes enforcement of the bond only, and does not interfere with, single out, or uniquely apply to the funds. *Id.* at 477, 479. The law does not require any administrative action by the funds, does not cause additional expenses, and applies to the funds in the same manner as it applies to all suppliers on the job. *Id.* at 479. To the extent the law provides an avenue of collection beyond that contained in ERISA's enforcement section, that is only an incidental result of the state law. *Id.* "This law does not effect an ERISA plan in any meaningful way." *Id.*

In *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), decided four months after *Travelers*, the Third Circuit found that a state cause of action on a bond is not preempted by ERISA. Noting that the bond was one of general applicability which makes no reference to an ERISA plan, and functions independent of an ERISA fund, the Third Circuit reasoned that the fund's suit against the surety was not predicated on the existence of an ERISA plan. In *Ragan* (unlike in *Ingersoll-Rand*), the cause of action was founded upon the bond, thus there was no need to inquire into — or even to determine — the fund's status as an ERISA plan or not, and the fund's status as an ERISA plan was not critical to establishing liability. *Ingersoll-Rand*, 498 U.S. at 139-40, 111 S. Ct. at 482-84; *Ragan*, 62 F.3d at 511. That the sums collected in the enforcement action on the bond may go to an ERISA plan's assets does not mean the suit is predicated upon ERISA, for if that were the test, the preemption analysis would be simple, and the numerous court analyses engaged in to date meaningless. *Ragan*, 62 F.3d at 512. *See also Local No. 46 Metallic Lathers Union v. Tratoros Construction, Inc.*, 920 F. Supp. 55 (S.D.N.Y. 1996) (suit by ERISA fund against surety on bond required by state law is not preempted under dictates of *Travelers* and *Greenblatt*); *Carpenters*

Local 261 Health and Welfare Fund v. National Union Fire Insurance of Pittsburgh, Pa., 686 A.2d 1373 (Com. Ct. Pa. 1996) (ERISA fund's action against surety under state Public Works Contractors Bond Act is not preempted); *Seaboard Surety Co. v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund*, 645 N.E. 2d 1121 (Ind. Ct. App. 1995) (Indiana Public Works Act, which requires surety bond, not preempted); *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Hawaii 487, 918 P.2d 1143 (Hw. 1996); *Eacott v. Insurance Company of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996). There is no known post-*Travelers* case which holds a state bond act of general application to be preempted.

Nonetheless, the petitioner argues that insofar as the New Jersey Bond Act creates an avenue of collection supplemental to those prescribed in ERISA, it is preempted. This argument is contrary to court decisions, flies in the face of common sense, and, perhaps most important, is contradicted by ERISA's purpose and legislative history.

First of all, ERISA's civil enforcement remedies (29 U.S.C. § 1132 and 1145) provide a cause of action by the ERISA funds against an "employer." ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). A surety is simply not an employer. As the Third Circuit stated, "[c]ourts that have considered the matter have all but unanimously held that sureties do not fall within this definition." *Ragan*, 62 F.3d at 512.[3] As the Third Circuit explained, the surety does not stand in an employment relationship with the funds or participants, is not the agent of the employer, and is not acting in

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3. At the time *Ragan* was decided, the only court to rule that a surety was an employer was the Southern District in New York. *Greenblatt v. Delta Plumbing & Heating Corp.*, 818 F. Supp. 623, 629 (S.D.N.Y. 1993). However, on appeal the Second Circuit reversed and, *inter alia*, expressly stated that the definition of "employer" under ERISA "does not include a surety . . ." *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575 (2d. Cir. 1995).

the interest of the employer. *Id.* at 512-13. The Third Circuit stressed that the surety does not have an ownership, agency or employment relationship with the fund or employer, and that the only relationship which does exist is a contractual one based on the bond — not on the collective bargaining agreement. *Id.*

Second, Congress did not intend for ERISA to supersede any and all state laws. This Court has repeatedly stressed that there is no ERISA preemption "if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans 'as is the case with many laws of general applicability.' " *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 130 n.1, 113 S. Ct. 580, 583 n.1, 121 L. Ed. 2d 513 (1992). As explained above, the purpose of ERISA's preemption provision is to afford the funds the advantages of a uniform set of administrative procedures in order to avoid the burden which would be imposed by a patchwork quilt of regulations. *Fort Halifax Packing*, 482 U.S. at 11-12, 107 S. Ct. at 2217. It does not follow from this purpose that fund trustees would be preempted from using a state law available to general creditors to collect money judgments. In fact, ERISA trustees are endowed with broad powers and duties to collect fringe benefit contributions in a diligent, systematic, and reasonable manner. *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 573-74, 105 S. Ct. 2833, 2841-42, 86 L. Ed. 2d 447 (1985).

When Congress enacted 29 U.S.C. § 1145, one of the two arms of ERISA's civil enforcement scheme, the intent was to promote prompt payment of contributions and to assist ERISA plans in recovering the costs incurred in connection with delinquencies. *See* Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. S. 1076, The Multi-employer Pension Plan Amendments of 1980: Summary and Analysis of Consideration (Comm. P. 1980 at 43-44). One of the problems which the Congress clearly sought to address in enacting 29 U.S.C. § 1145 was the problem created by employer delinquencies. *Id.* Far from ever intending to prevent trust funds from using neutral state statutes that did not relate to employee benefit plans, the Congressional record makes it clear that Congress did not intend to preclude use of permitted state or federal remedies against delinquent employers.

As the House Report states: "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869, 96th Cong., 2d Sess., 1980 U.S.C.C.A.N. 2993, 3038.

To preempt the use of a state bond law of general applicability as a means of collecting monies owing to an ERISA fund would be cruelly ironic, given ERISA's fundamental goal of protecting participants' benefits and assets. Trustees of employee benefit plans have a fiduciary duty to collect delinquent trust fund contributions, and ERISA requires the trustees to discharge their duties solely in the interests of the participants and beneficiaries. 29 U.S.C. § 1104(a)(1). If the trustees of funds in New Jersey may not seek the aid of New Jersey's generalized bonding statute in order to pursue monies properly owing to the funds, the trustees would be needlessly limited in discharging their obligations. More important, this would undermine the salutary policy underlying the federal law and deprive the participants and their beneficiaries of monies that are properly theirs.

Third, the courts have made clear that a state law which merely provides another means of collecting monies rightly belonging to the fund does not preempt ERISA when the state law does not interfere with ERISA's own enforcement scheme (*i.e.*, preemption is triggered by a conflict or restriction, not a supplement.) *Ragan*, 62 F.3d at 512 (state claim preempted if it "conflicts" with ERISA); *Warranty Builders, Inc.*, 821 F. Supp. at 479; *Hawaii Laborers' Trust Fund*, 918 P.2 at 1154; *Plumbers Local 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis. 2d 233, 445 N.W. 2d 43, 45 (App. Div. 1989).[4]

The petitioner asserts that at least some courts have found that

4. In *Greenblatt*, the Second Circuit observed that the use of the state bond law to sue a surety for monies owed to the ERISA fund was not a supplemental remedy to ERISA's enforcement provision because a suit against the surety was not even an ERISA matter, the surety not being an employer. 68 F.3d at 576.

a state bond act of application is nonetheless preempted. To be sure, two cases do hold that: *Trustees of Electrical Workers Health and Welfare Fund v. Marjo*, 988 F.2d 865 (9th Cir. 1993) and *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Company*, 870 P.2d 960 (Wash. 1994). However, prior to *Marjo*, the Ninth Circuit had twice found no preemption under identical circumstances.[5] The Ninth Circuit changed its mind in *Marjo* because it construed this Court's then recent holdings as establishing a broader parameter of ERISA preemption. 988 F.2d at 867-68. Whether the Ninth Circuit misread those cases or not, its holding in *Marjo* is certainly wrong under *Travelers* and *Dillingham*. The Ninth Circuit had it right the first two times. And in *Puget*, the Supreme Court of Washington was simply following the Ninth Circuit in *Marjo*. Most important, both *Marjo* and *Puget* are not merely anomalies, they pre-date *Travelers*. There is no longer even an argument for following them down a misguided path.[6]

It must be reiterated that the New Jersey Bond Act does not confer any special rights or preferable treatment on ERISA funds. The Bond Act was enacted decades before ERISA and applies equally as well to a wide variety of suppliers of a contractor on a public job. The Bond Act reflects and arises from the historic state regulation of public work projects. This history, and the intent of the Bond Act, is wholly independent of and unrelated to ERISA or

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5. *Carpenters Southern California Administrative Corp. v. D&L Camp Construction*, 738 F.2d 999 (9th Cir. 1984); *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984).

6. The petitioner also argues that the Supreme Court of New Jersey erred by misreading *Ragan* and *Greenblatt*. Specifically, petitioner states that those two cases dealt only with common law actions against a surety, not a state bond act. That was, and is, a distinction without a difference. In *Ingersoll-Rand*, this court made it clear that ERISA preemption analysis applies equally as well to both state laws and state causes of action. Moreover, cases decided since *Ragan* and *Greenblatt* have adopted and applied their reasoning to bond act suits. *Blieler v. Christwood Contracting Co., Inc.*, 72 F.3d 13 (2d Cir. 1996); *Tratoros, supra*; *Carpenters Local 261, supra*.

an ERISA fund. As this Court has recognized, the states possess broad authority under their police powers to regulate the employment relationship so as to protect workers within the state. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 2398, 85 L. Ed. 2d 728 (1985). The New Jersey Bond Act is nothing more than this state's proper exercise of its traditional and historic police powers in a manner of general applicability, remote from ERISA's shores.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully requests that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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